

Governance Teams, Fiduciary Duty, and Intellectual Property

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Abstract

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This conceptual paper is aimed at developing one thesis: articulating the rationale for why governance teams should recognize intellectual property as assets to be managed per their fiduciary responsibilities. Most governance teams limit their fiduciary scope to financial assets, which is not surprising given the prevalence of the financial management model in use at many nonprofit organizations. However, the financial management model generally ignores crucial, legally defensible, and sometimes valuable assets from the oversight of the governance team because it doesn't have a place on the balance sheet. Related to this thesis, I will present the data gathered in the survey research, the relevant analysis of governance questions in the survey, and present some questions for further research and consideration.

I. Background

In 2013 I wrote a course paper analyzing some case studies of social entrepreneurs. I was interested in articulating the various ways these leaders and their organizations were leveraging intellectual property to scale. In the course of researching and writing that paper a new set of questions emerged. Specifically, I noted that few of organizations analyzed even mentioned intellectual property, let alone articulated managing or leveraging it for scale. However, it was clear in the review of their attempts to scale that a crucial part of the value proposition was that the organization had "something" that worked and was worth scaling. That "something" was partly intellectual property, either in the form of a product, program, process, or proprietary intelligence for executing the organization's mission. I was curious if this disregard for the term "intellectual property" was simply a terminology gap or if it was part of a larger disconnect between the assets of the organization and the strategy to execute a mission and achieve their vision.

In 2014 I conducted a survey of social entrepreneurs/social enterprises¹ in order to gather basic information on their management of intellectual property. Social entrepreneurship and

¹ SEs, for the purposes of this survey research, were limited to social sector organizations classified by and registered with the U.S. Internal Revenue Service (IRS) as 501(c)3 organizations and vetted by the Social Impact Exchange (2014) for meeting specific impact, growth, and evidence benchmarks. The 501(c)3 classification refers to nonprofit organizations in the U.S. that meet standards for public benefit and are granted exemption from federal income tax, except as it applies to unrelated business income. The 501(c)3 status also confers a second tax

social enterprise (SE), defined as innovation in the social sector, is also accompanied by the creation of intellectual property assets. Innovation in industry is often marked by the creation of some form of intellectual property (IP). Does it therefore follow that the executives and stakeholders of SEs recognize and value the IP in these organizations, too? To the best of our knowledge, no research has been conducted or published on the management of intellectual property by SE to generate revenue, expand organizational opportunities, recruit and retain talent, attract investors (donors), or secure their niche, as is done by industry. Understanding these uses of intellectual property in SE is important to gaining a richer understanding of how SEs operate, how their governance teams think about and manage the SE's innovations for addressing social problems, and how they communicate or leverage the value of their IP with stakeholders.

The survey questions are a first step towards understanding social enterprise (SE) organizational strategy and philosophy for growth, scaling, and/or replication activities and the IP policies that support that organizational strategy. We were interested in a few key intellectual property management decisions:

- Whether SEs recognize the intellectual property within their organizations. For example, do SEs think of their innovations, like activity sheets for an after-school arts program developed by staff, as qualifying as IP under copyright law?
- How they protect it: Do SEs have written policies regarding their IP? Who/what was the impetus for these policies come from: internal or external stakeholders? Who is responsible for enforcing the policies?
- What are the consequences, if any, of the existence of those policies. Are there variations in the IP policies across organizations? Do these policies support employee and trustee recruitment and retention? Do these policies enable revenue generation, business expansion (i.e. scaling/replication), or niche protection?

Overall, the responses were intriguing and raise a number of questions for future research. The goal of this is to articulate a new thesis: that governance teams have a fiduciary duty to recognize, safeguard, and manage the intellectual property assets of nonprofit organizations.

II. Intellectual Property Assets of Firms

In finance and financial accounting, an asset is an economic resource. Anything tangible or intangible that can be owned or controlled to produce value and that is held by a company to produce positive economic value is an asset. The balance sheet of a firm records the monetary value of the assets owned by that firm. It covers money and other valuables belonging to an organization. Assets are classified into two major categories: tangible assets and intangible assets. Tangible assets contain various subclasses, including current assets and fixed assets, but generally refer to resources that have a physical form, such as money, equipment, buildings, land, and inventory. Intangible assets are nonphysical resources and rights that are valuable to the firm because they can give the firm some kind of advantage in the marketplace. Intangible assets include an organization's goodwill, copyrights, trademarks, patents, and trade secrets.

Intellectual property assets are strategically used by industry to generate revenue, expand business opportunities, recruit and retain talent, attract investors, and to secure a market niche. In the United States (U.S.), which was the legal framework used for developing questions in this survey, four primary forms of legally defensible IP rights are granted: patents, trademark, copyright, and trade secret. Patents and trademarks are granted and administered through the U.S. Patent and Trademark Office. Patents are available for new, useful and non-obvious processes or products and must be vetted against existing patents and registered to be valid (Clowney, 2011). A trademark is defined as "...a word, symbol, or other signifier used to distinguish a good or service produced by one firm from the goods or services of other firms" (Landes and Posner, 2003) and must be registered to be enforceable. Copyright is the protection of facts or ideas in a work of original authorship, such as books, training manuals, computer programs, databases, and various forms of art, once they are in any tangible form of expression (Akin, et al., 2007). Copyright can be registered or not and still be a protected asset. However, to defend copyright as a right of access against infringement in a court of law registration with the appropriate state and federal agencies is necessary. Trade secret, by contrast, is not registered or disclosed publicly as it "...is an item of information—commonly a customer list, business plan, recipe, or manufacturing process—that has commercial value and that the firm possessing the information want to conceal from its competitors in order to prevent their duplicating it." (Landes and Posner, 2003)

Commercial firms are increasingly acknowledging that IP is a primary source of a firm's value and represents a large portion of the market capitalization in publicly traded firms (Johnson, Neave and Pazderka, 2001; Phelps and Kline, 2009). From a governance perspective, the industrial firm's executives have a vested interest in the increasing pool of IP assets and the associated or realized value of the IP asset pool. External stakeholders, such as shareholders, institutional investors, collaborating firms, complementary firms, or customers, also value a commercial firm's IP assets. That value is expressed through financial and/or contractual transactions with the firm. Historically, commercial firms have chosen from defensive, offensive, and/or open strategies to manage and leverage their IP assets (Fisher and Oberholzer-Gee, 2013). Commercial firms increasingly employ a mix of those strategies to optimize business objectives (Henkel, Baldwin and Shih, 2012; Phelps and Kline, 2009; Roijakkers, et al., 2013; World Intellectual Property Office, 2011).

The literature on intellectual property and the commercial firm is extensive - both in academic literature and popular press. The corresponding literature on intellectual property in the nonprofit firm is miniscule in comparison. The majority of peer-reviewed and professional literature on IP in the social sector is focused on basic legal rights in copyright and trademark. There is, however, a segment of literature that focuses on the economic and social justice impacts of strong and weak IP regimes of various countries on the development of pharmaceuticals. This is relevant in that some of the development work is done at or in collaboration with nonprofit institutions and the pharmaceuticals are targeting critical global health needs, so the strategic choices nonprofit firms make about their IP can have significant consequences for how addressing humanitarian issues. In adjacent intellectual capital literature there are some references to IP management by nonprofits as part of a larger knowledge asset management strategy (Kong, 2003; Kong 2007). Additionally, some anecdotal insight on the philosophy of IP management can be gleaned from blogs, interviews, and discussions with practitioners (Jewell, 2013; Tripp, 2013; Strickland, 2013), but that is not enough to establish standards of practice or generalizations for the sector at-large. The survey conducted in 2013/2014 is a small dataset that gathers some basic information on governance team recognition and strategic management of SE's IP. Despite the lack of IP content in academic literature and practical resources, the survey responses indicate that IP is created, it is leveraged, and,

therefore, governance teams² are required under their fiduciary duties to manage it for the benefit of the firm's stakeholders, which can be the people it serves, donors, community members, collaborators, and aligned organizations.

III. Governance and Fiduciary Duty

It is important to define governance in the context of this research. Governance is a process or set of processes for decision-making around such organizational functions such as setting strategic direction and priorities, developing and allocating resources, setting operational policies and oversight controls, assessing progress towards mission and business plan objectives, and ensuring that responsible parties exercise fiduciary duties in the decision-making process. The board, and the staff members and communications between the board and staff, are a structures. What the individual board and staff members know about governance, fiduciary duty, and firm assets will directly impact the oversight of those assets. Nonprofit organizations are increasingly complex and their size and scope "compels directors and officers to rely heavily on other directors and officers, employees, professionals, and other persons," which is perfectly legal and rational. But that has consequences for governance teams and their execution of fiduciary duty. For example, if the governance team, i.e. the members of the board and the staff that supports their work, are unaware that IP exists within the firm, or that it is an asset, then it is unlikely that the governance team is able to execute their fiduciary duties related to those assets.

There are three fiduciary standards required of the members of a 501(c)3 governing board in the U.S.: care, loyalty, and obedience. The duty of **care** requires that directors be informed, exercise independent judgment, and act in good faith (Brody, 2006). The duty of care is about the manner in which directors undertake their responsibilities. A director can fail in two ways under the duty of care: first, by failing to supervise the organization, and, second, by failing to make an informed decision about an action before the board (Fishman and Schwarz, 2010). The **loyalty** requirement expects directors to make decisions objectively, act in a manner that does not harm the organization, and avoid using their position to obtain personal benefit or advantages (Fishman and Schwarz, 2010). Brody (2006) points out that separating the related duties of care and loyalty is not always easy as they implicate each other, especially when a conflict of interest

² Governance team is defined here as the members of the nonprofit board with whom the fiduciary duties rest and the professional staff of the organization upon whom they rely for information, knowledge, and skills related to the management of the nonprofit organization.

transaction (loyalty) is being debated and considered (care) by other directors. Finally, the duty of **obedience** requires directors to carry out the purpose of the organization (Fishman and Schwarz, 2010), such as the expressed mission and vision. Various applications of this duty include the requirement that directors obey applicable laws, ensure compliance to donor restrictions, and consider the impact of organizational decisions on stakeholders (Fishman and Schwarz, 2010). These three standards are intended to focus the efforts of the members of the governance team on thoughtful, responsive, ethical, and prudent actions to protect and support the continued viability of the organization's operations and assets.

IV. Survey Sample

The sample used was a convenience sample of easily contactable social enterprise leaders. The S&I 100 Index (2014) was discovered in the course of scanning "best of" lists. This index is curated and compiled by the Social Impact Exchange. Using the organizations on the S&I 100 Index as the sample offered a solution to the issues created by the method outlined above. The Social Impact Exchange only lists SE organizations based in and operating in the United States. In addition, they vet each SE on their list against a standard rubric for impact, growth, and evidence criteria. The Social Impact Exchange, though not willing to provide a file of contact information for their list, did give permission to join their organization. Membership with the Social Impact Exchange provided access to the email address of the CEO for every organization on the S&I 100 Index. All 107 organizations on the S&I 100 index were included in the convenience sample for this survey.

The email recipients of the survey were executives of SE organizations since they are likely to have primary control over the implementation of policies and the IP decisions of the organization on a daily basis. Included in the instructions with the survey was that it should be completed by an Executive level staff member such as Chief Executive Officer, Executive Director, Chief Financial Officer, Chief Operating Officer, Chief Counsel, President, Vice President, and similar positions. This was to ensure that the respondents to this survey are individuals who would be part of the governance team of the organization. The importance of including non-board governance team members is that even though they may not vote or carry fiduciary duties vested in the board, they are critical to informing, shaping, and executing the higher-level strategic functions of the organization in partnership with voting board members.

The majority of nonprofit board service is voluntary and non-compensated and, thus, utilizes the professional expertise of the management staff to inform, educate, and research the decisions facing the voting governance team members (Goldschmid, 1997).

V. Survey Findings

The 107 executive contacts were emailed an invitation to participate in the survey with a link to the survey (Appendix A) included in the email. Five of those emails were undeliverable. Three of the undeliverable receipts provided alternate contact information. Those three alternate contacts were also sent an invitation to the survey. In total, 110 invitations were emailed to 105 contactable organizations.

Twenty-one organizations registered and completed surveys for a 20% participation rate. All responses were anonymous. Fifteen (71.43%) respondents identified as CEO/Executive Director, two (9.52%) selected COO, one (4.76%) indicated Chairman of the Board, or similar position. There were three write-in responses; two (9.52%) wrote legal counsel and one (4.76%) was general counsel. All of the respondents met the requirement that a member of the organization's executive leadership complete the survey.

The first question in the survey asked respondents to identify which forms of IP the organization has as a part of its assets, brand, services, marketing and/or program materials. One of the possible answers to this question is "none of the above". The two respondents (9.52%) that chose "none of the above" were skipped to the end of the survey where they were asked to identify their position in the responding organization and thanked for their participation.

The remaining 19 (90.47%) respondents identified as having one or more forms of IP assets forms within the organization. This is a high percentage, but seems reasonable for two reasons. First, the sample is composed entirely of SE firms who, by definition, are innovative and are likely more cognizant that IP is a product and tool of the innovation process. Second, there is a distinction between recognizing and identifying IP in an organization and actively managing that IP. It is not unreasonable to assume that most executives can identify and define patents, copyrights, trademarks, and trade secrets within their organization since they are skilled leaders. This does not imply that those leaders or their organizations actively manage the IP however, simply that they can recognize and identify it.

Seventeen (89.47%) of these 19 respondents have trademark(s). Seventeen (89.47%), though not the same 17 as the trademark respondents, indicated having copyrights. Two (10.52%) indicated trade secrets. Those same two organizations indicated having all three forms of IP. None of the respondents indicated a patent as part of their IP assets.

The 19 respondents indicating that their organization had IP assets were then asked whether the IP was officially registered with either the U.S. Copyright Office or the U.S. Patent & Trademark Office. Three of these 19 respondents (15.79%) indicated that none of the IP were registered with either office. One (5.26%) indicated that only the copyright is officially registered. Five (26.32%) indicated that the trademark is officially registered. And 10 (52.63%) indicated that both are officially registered. Copyright law does not require registration to provide legal protection, so the fact that only 11 (64.70%) of 17 organizations with copyrights have them officially registered is not surprising. However, a trademark is not enforceable unless it is registered. The responses indicate that 15 (88.23%) of 17 organizations with trademarks have secured proper trademark registration. Although this seems a high percentage, and indicates that leaders recognize IP, some have not undertaken all of the basic and necessary legal steps to secure the enforcement of the organization's property rights.

Next, the 19 respondents with IP (hereafter referred to as "respondents") were asked if the organization has written policies regarding IP. Ten (52.63%) of the respondents indicated yes, 8 (42.10%) indicated no, and 1 (5.26%) indicated that they do not know. Although 16 (84.21%) respondents have undertaken the required protocols to legally protect their IP, only 10 (52.63%) of them have internal controls guiding the management of their IP.

The 10 respondents with written policies were given the following policy topics and asked to indicate all that applied to their organization's IP policies. The number of respondents selecting each policy precedes each option:

- 6 (60.00%): Licensing of intellectual property
- 5 (50.00%): Sale or transfer of intellectual property
- 9 (90.00%): Safeguarding of intellectual property through non-disclosure agreements when partnering with other organizations
- 5 (50.00%): Registration of intellectual property with relevant governmental agencies (e.g., U.S. Patent Office)
- 6 (60.00%): Using intellectual property as a strategic tool

- 5 (50.00%): Enforcement of intellectual property rights through legal means (e.g., patent enforcement or copyright infringement)
- 4 (40.00%): Non-compete clause in employment agreements
- 8 (80.00%): Proper use and display of brand and trademark
- 0 (0.00%): Other, with text box for further description.

None of the respondents selected all of the policies. The most common policies in place in organizations with written policies are non-disclosure agreements and proper use and display. This indicates an IP-safeguarding preference among SE organizations that have policies in place. Those indicating policies for licensing, sale or transfer, legal enforcement, strategic use, and non-compete clauses suggest that some SE organizations have looked at the IP in terms of the traditional industry IP strategies of niche protection, revenue generation, attracting investors, recruiting and retaining talent, and business expansion.

Respondents with written policies were then asked who suggested the need for written IP policies. Two (20.00%) indicated that the Board of Directors was the originator. Five (50.00%) chose management as the originator. Two (20.00%) of the organizations had IP policies suggested by outside legal counsel. Finally, one (10.00%) wrote in that the policy originated from internal legal counsel, which can be classified as management, bringing management's share of origination to 60.00% and all other sources totaling 40.00%. Within this sub-group of 10 respondents, the majority of management teams appear to be cognizant of the role of IP within their organization and are proactive in the policy development to manage it.

This same written policy group was then asked who has day-to-day responsibility for IP management in the organization. Respondents could select CEO/Executive Director, COO, CIO, Chairman of the Board, or Other with a write-in field. Five (50.00%) of the organizations indicated the day-to-day IP management rests with the CEO/Executive Director or the COO. None of the organizations indicated the CIO or Chairman of the Board. The following write-in responses were collected: "Director of Finance and Administration", "Office of General Counsel", "the overall organization", "Chief Financial and Administrative Officer", and "Marketing and Operations work together to ensure IP protection".

The number of write-in responses reflects as much about organizational structure as it does IP management. Some organizations appear to rely on executive leadership to manage the IP and others seem to take a more broadly-distributed view of IP management. This could be

related to the nature of the organization's work. For example, IP could be a discreet asset such as a donor contact list. Or, the IP could be shared across the routine programs and services, which could lead to a more diffuse decision-making process for leadership. Although all 10 respondents were able to indicate who is responsible for IP management, only 4 (40.00%) indicated that this responsibility was outlined in a policy.

Only 10 (52.63%) of the 19 respondents answered a question about whether the organization has enforced its IP rights through legal action. Four (40.00%) indicated yes, five (50.00%) indicated no, and one (10.00%) did not know. The low response rate to this question could indicate that the question was unclear to respondents, or, for some reason, they were unwilling to answer. Those that did answer indicate that SEs are willing to defend their IP rights, though we do not know to what extent, since legal action can take many forms.

All 19 respondents were then asked if any of the organization's IP was developed with funds from a foundation or government agency. Nine (47.37%) indicated yes. These nine were then asked if the organization retained the rights to the IP developed. Five (55.56%) indicated that the organization retained the IP and four (44.44%) indicated that it depended on the funder. Nine (47.37%) respondents indicated that none of their IP was developed with foundation or government money and one (5.26%) did not know.

The funding and the assignment of an SE's IP rights are important to the long-term management of the IP. External funding that does not come with clear guidelines on assignment of rights can lead to disputes over ownership and rights to revenue (Bloom 2011a; Bloom 2011b). Five (55.56%) of the nine organizations that have IP developed from foundation or government funds indicated earlier in the survey that they do not have written policies for IP management. Only three (33.33%) of the nine with IP developed without foundation or government funding do not have written IP policies. This suggests that although an organization might recognize IP, it is less likely to have internal controls in place when the IP is developed with foundation or government funding.

In a related question, 18 respondents replied that no individuals hold rights to the organization's IP. Though one respondent did not answer this question, all 19 respondents answered the follow-up question of whether there is a written policy in place for the vesting of property rights for IP developed by an employee. Seven (36.84%) indicated that there is a policy, nine (47.36%) replied that there is no policy, and three (15.79%) did not know if there is a

policy. Organizations unanimously indicated that individuals do not hold the rights to any of the IP, but 12 (63.15%) indicate that either there is no policy, or are uncertain if there is a policy. IP is generally considered an intangible property (Landes and Posner, 2003) and without clear policies related to the assignment of employees' work product the assumption that IP rights vest with the organization is problematic (Lenkowsky, 2013; Bloom, 2011a; Bloom, 2011b). It is problematic because the intangible nature of IP leads to questions of what is a person's accumulated knowledge brought to the workplace versus new work created for the employer. Gosseries, Marciano, and Strowel (2008) also point out that it is difficult to separate an idea from its' expression, but some delineation must be made for expression to transform into intellectual property.

Next, all respondents were asked who is authorized to make decisions regarding the use of IP on behalf of the organization. This question is distinct from the one asked earlier about the day-to-day management because it gets at the strategic, rather than tactical, usage of IP. Ten (52.63%) respondents selected the CEO/Executive Director. Six (31.58%) respondents wrote-in the following:

- CEO, Director of Finance and Administration, Board
- Office of General Counsel
- Full Board of Directors
- Contract with Copyright holder
- Combination of Chiefs of Academic office and Program and Partnerships
- General Counsel

One (5.26%) indicated COO and two (10.53%) indicated Chairman of the Board. Comparing with the earlier IP management question, two (10.53%) organizations indicated that the day-to-day management and strategic decision-making reside with the same person/office. Only three (15.79%) indicate that this strategic decision-making authority is captured in a policy. The other 16 (84.21%) indicated that there is no policy on IP decision-making for the organization.

The lack of a decision-making policy is surprising given the responses to the next series of questions in the survey about the strategic use of IP to earn revenue, scale the organizations, leverage resources, and expand partnerships. Most of the organizations indicate that they engage in at least one of those strategic activities with their IP, but the internal controls about who has the decision-making authority to commit the organization's IP are weak in the majority of SE

respondents. Over time, with changes in staff and governance, the lack of clear authority for a critical organizational asset can lead to larger organizational issues.

The 19 respondents were asked if the organization licenses any of its IP to other external users. Eighteen answered the question and one skipped it. Nine (47.37%) of the respondents indicated yes and nine (47.37%) selected no. The nine respondents indicating yes were then asked five follow-up questions to understand the nature of the licensing. Three (33.33%) of the nine that license charge licensing fees to other users, one (11.11%) does not, and five (55.56%) charge for licenses only sometimes. When asked about the type of organizations that license the IP from our respondents, all nine (100%) organizations license to other non-profits, four (44.44%) license to for-profits, six (66.67%) license to government agencies, and one (11.11%) licenses to all three.

All 19 respondents were then asked if the organization's IP is used to earn income via program fees, sales, or contracts to provide goods or services. This is distinct from the licensing revenue question presented earlier as it is related to the operations and services of the organization rather than scaling and/or replicative goals usually sought through licensing. Eleven (57.89%) selected yes and eight (42.11%) selected no. This suggests that more SE organizations in the sample utilize IP as a source of revenue generation than do not. However, this limited sample does not indicate that leveraging IP for revenue is a top strategic priority. Of the 11 earning income with IP, seven (63.64%) go about it using at least two of the three options. The other four (36.36%) organizations rely exclusively on either sales or contracts to provide goods or services as the IP revenue generator.

In industry, IP assets are used to expand market opportunities, and partnering with other brands or companies is one strategy for market expansion. The 19 respondents were asked if the organization's IP is used to create partnership opportunities with other organizations or agencies. Seventeen (89.47%) indicated yes and two (10.53%) indicated no. Those indicating yes were asked to identify the purpose of those partnerships. The response selections are as follows:

- 16 (94.12%): Reach new constituents
- 6 (35.29%): Advocate
- 12 (70.59%): Generate revenue
- 4 (23.53%): Other

The write-in responses for "Other" were:

- scale our mission efficiently and effectively

- educate/build capacity
- maintain quality control, consistency among programs, and fidelity to model
- serve teachers and help districts develop robust induction programs

Except for the quality control response, the write-in responses could be categorized with the answers provided. The responding SEs generally do utilize their IP for market expansion, and with this sample it is a priority.

All 19 respondents then indicated that the organization has specific growth/scaling goals and that IP is leveraged to grow or scale the organization. From responses to previous questions, we know that nine (47.37%) license the IP, eight (42.10%) use it to generate revenue, and almost all use IP to expand market opportunities. All of these IP strategies can be critical components for scaling the organization. However, only 7 (36.84%) of 19 utilize all three strategies. Five (26.34%) use two of the strategies while six (31.58%) only attempt one strategy. One (5.26%) SE indicated that it did not use any of the strategies in its operations.

Another use of IP in industry is to create a competitive advantage for recruiting and retaining employees and corporate board members (Bingham and Spradlin, 2011). Five (26.32%) of the 19 respondents leverage IP to recruit either staff or board members. Three (60.00%) of those five SEs believe that this strategy has resulted in a larger candidate pool. Two (40.00%) did not know if the IP attracted more candidates. Though this is too small of a sample to be conclusive, it is interesting that none of the organizations said that this strategy had not increased the candidate pool. This suggests that some SEs are proactive in showcasing their IP to potential employees and board members.

Finally, respondents were asked a series of questions to determine if IP is used to generate revenue through grants, contracts, and program related investments (PRIs). These questions differ from those related to license fee and income questions because they are targeted at identifying if SEs use IP to obtain “investors” like a for-profit company would, but in the form of donors or grantors. Fifteen (78.95%) SEs indicated that the organization seeks grants/contracts from government agencies, three (15.79%) do not, and one (5.26%) does not know. Eleven (73.33%) of the 15 seeking government grants/contracts currently have government grants or contracts that incorporate the SE’s IP in the execution of the agreement. Fourteen (73.68%) of 19 respondents leverage IP to seek grants or PRIs from foundations, three (15.79%) do not, and two (10.53%) do not know. Of the 14 seeking grants or PRI’s, 10 (71.43%) currently have grants or

PRIs that incorporate the SE's IP in the achievement of goals and/or deliverables. SEs do leverage IP to attract investors, but it is not a universal strategy since one organization uses neither strategy to attract investors.

VI. Implications

In the United States organizations that seek federal tax exemption from the Internal Revenue Service (IRS) are required to submit Form 1023 that describes the organization's charitable purpose, activities, some policies around governance issues, such as conflict of interest, and the current and expected assets of the organization. Of note, one question the IRS asks is Part VIII of the form is:

Do you or will you publish, own, or have rights in music, literature, tapes, artworks, choreography, scientific discoveries, or other intellectual property? If "Yes," explain. Describe who owns or will own any copyrights, patents, or trademarks, whether fees are or will be charged, how the fees are determined, and how any items are or will be produced, distributed, and marketed. (IRS, 2017)

Most nonprofit organizations are likely to only file one Form1023 in their course of operations. This filing also occurs at a fairly early point in their operations or financial maturity where understanding what all forms of intellectual capital might be generated over the life of the organization is not top of mind for most managers or founders. It is important though because it indicates that the IRS considers IP of applicant organizations to be important. The IRS explains that:

We are specifically interested in situations where an organization intends to exploit its intellectual property commercially. For example, if you intend to develop a smoking cessation program that will be marketed to the public, you should explain the ownership and rights, including sharing of revenues with private parties. If an organization intends to develop brochures and other materials relating to its fund raising efforts, this type of general explanation would be sufficient. (IRS, 2018)

Since the IRS is the primary federal enforcement agency for nonprofit organization operations and compliance, the above suggests that the IRS expect nonprofit organization governance teams to recognize, articulate, and understand the relevant rights and ownership in IP assets from its earliest operations.

In *Oberly v. Kirby*, the Delaware State Supreme Court stated, as part of its ruling regarding a nonprofit board's business judgment and conflict of interest, "although principles of

corporate law generally govern the activities of such a [charitable] corporation, its fiduciaries have a special duty to advance its charitable goals and protect its assets" (Goldschmid, 1997). The last clause is important, especially since, as D. Gordon Smith (2002) says, "fiduciary law is messy." The Court makes a clear statement that the duties of nonprofit board members have, in their obligations of care and loyalty, to govern for the charitable goals and protection of assets.

As discussed above, intellectual property assets are recognized by commercial firms, accounting and finance standards, and the IRS to be assets of organizations. It is clear from the above that the IRS considers IP to be potential valuable assets of the organization. Given both of those facts, it follows that governance teams are responsible for identifying, safeguarding, and managing IP assets under their existing fiduciary duties in order to "advance its charitable goals and protect its assets" (Goldschmid, 1997).

From a practical perspective, social sector organizations and their governing teams tend to focus on the management of financial assets and the relation of those assets to achieving their particular mission and social impact. The limitations of the financial management model for achieving long-term growth and impact have led to many of the innovations in the social sector business model (Tuckman and Chang, 2006), the creation of new organizational forms over the past two decades such as L3C and B-Corp, and the rise of alternative delivery models for social problem solving (Bugg-Levine and Emerson, 2011; Vogel, 2005).

The framework of intellectual capital theory is potentially useful to our understanding of the need for social sector governance teams to consider all organizational assets, not just financial assets, when assessing the resources available for achieving missions (Kong 2003; Kong 2007). Intellectual capital is the identification and management of the human, network, and structural assets of a firm (Bontis, 2001). The accepted definition of the theory incorporates the intellectual property assets into the structural assets of the organization (Bontis, 2001). If we accept that there are more assets in social sector organizations than just the financial assets, we can see that part of the governance role of the directors would include the active oversight and management of these assets, too. Directors should be as aware of intellectual property assets and how they are deployed to achieve the mission, generate revenues, recruit and retain staff, etc., as they are about the current financial health and future financial prospects of the organization. Indeed, we see some evidence of this governance behavior in the survey responses.

To be clear, this thesis that it is a fiduciary duty of governance teams to include the oversight of IP assets is not to argue that nonprofit organizations utilize their IP for any of the commercial purposes, or in the competitive ways, that commercial firms do. Indeed there are reasons why that would be completely inappropriate for some organizations. Rather, what is important is that, as assets, they are critical components of how nonprofits are fulfilling their charitable purposes. The responses by the organizations completing the survey outline a number of non-monetary purposes for which they find their IP to be an important asset: donor and staff recruitment, reputation building, network building, policy reform/change, knowledge creation, and collaboration would be how we might classify those activities by nonprofits who are not commercially exploiting their IP assets. By not recognizing, safeguarding, and managing IP assets, governance teams are failing to fulfill a critical part of their fiduciary duties.

VII. Future Research

Pick up almost any text on nonprofit management and the discussion of assets will focus primarily on the tangible assets of cash (and cash-like resources), buildings, land, and equipment. If there is a discussion of intangibles, it is likely "goodwill" that the organization has in the community or among its stakeholders. Even if a nonprofit is not particularly generative or innovative in creating intellectual property, it is very likely that at least one trade secret exists in even the most modest nonprofit: the donor contact and data lists. Donor information qualifies as a trade secret and is, arguably, one of the key resources (i.e. assets) of the organization. The survey responses also give a good indication that these are actual gaps in IP management that exist in their organizations. As the sector increasingly prioritizes innovation, the acceleration of problem solving, and the introduction of new organizational forms, the need for those in governance positions to be aware of and managing for all organizational assets is crucial. It is also important that staff identify and catalog the knowledge assets being used, developed, and revised within the organization and communicate that to their governance teams.

However, we know that boards are often uninformed about the key components of the organizations they serve. They are disconnected from the day-to-day operations, and, as Goldschmid (1997) notes, are faced with providing management and fiduciary duties to increasingly complex organizations with many lines of business, which may be outside the

individual directors expertise and knowledge. This reality is complicated by what the survey data above bears out: nonprofit organizations are creating IP. They are, in turn, leveraging that IP for various strategic purposes. The governance teams surveyed do appear to be aware of the value of their IP assets and have made some efforts towards managing it as part of their fiduciary duties.

The responses from this survey provoke many questions for further study, though the questions that follow are by no means exhaustive. Most organizations that responded to the survey had multiple forms of intellectual property within their organizations. These SEs were likely to have a better understanding of innovation and IP based on their categorization as social enterprises. What would the data look like in a survey set of any kind of 501c3 organizations? Are SEs more aware of and actively managing IP than any other 501c3?

The professionals working in the sector are knowledgeable, but their knowledge may be in a particular area of service expertise that would not have provided exposure to intellectual property management. Some additional lines of inquiry might include: What is the general knowledge of governance teams about intellectual property? Do they know how to identify it? Do they have the practical and technical skills to identify and evaluate it for the nonprofit? What knowledge do they have of the strategic uses of intellectual property? What knowledge do they have of how to align the mission, values, and activities of the organization to any intellectual property management strategy that they might choose?

The sample is too small to know how representative it is across the SE landscape. In addition to a larger sample and response rate, the data collected with this survey would be enhanced with information about the age of the SE, the composition of the board of directors, the number of staff and constituents served, and financial statements. This information could be used to show how differences in IP management correlate to the financial and impact metrics of the SE. We could also begin to assess if there are differentiations in the knowledge and skills of the governance team and how that impact the fiduciary oversight of IP assets.

It is clear that, at least among those that participated in the survey, SEs are able to identify IP among the organization's assets and that most take the necessary steps to ensure legal protection. Further, some will even defend their legal rights by taking action against infringers. Opting to undertake legal action is one way of executing fiduciary duty to safeguard an IP asset. This prompts questions of whether SEs are more apt to take legal action, in general, to protect IP, or if this is true of all non-profits. How do they scan for infringers? Are certain types of IP more

zealously defended than others? What legal recourse do they take and what resources do they expend in that process?

Only slightly more than half of the respondents with IP also have written policies for management and strategic use of their IP. By far, the most common policy is on non-disclosure when partnering with other organizations, making protection of the IP a clear priority. Also common among the written policies are standards for brand and trademark display which signals that this is important to the organization. Policies on strategic use, non-compete clauses, and enforcement of rights through legal means were less common, but this does not prove that organizations do not manage the IP via these methods. It only indicates that these processes are not a part of codified internal controls. Future inquiries could look at governance team management of IP versus the written policies to discover whether SEs forgo written policies but are still active and strategic IP managers, which is what the respondents' answers to questions about leveraging IP seem to imply. It would also be useful to know the form and function of IP within an organization to know if certain policies or management tools are even necessary. For example, if an SE's only IP is its logo, which is a trademark, is a policy on non-compete clauses necessary?

SEs responded that IP management is a mix of strategies. Only one firm licensed IP, leveraged it for revenue generation, and incorporated it into market expansion opportunities. The same firm uses IP to recruit both employees and board members. However, that organization did not use it to leverage investors via government grants or contracts. The rest of the 19 respondents ranged from indicating none of those strategies to a mix of, on average, 3 or 4 strategies. IP strategy maximization is not required of firms and may not be relevant to many firms. Future investigations could look at the type and function of a firm's intellectual property and compare it to the management strategies utilized and correlate it to specific organizational goals for revenue generation, recruitment, niche protection, and scaling/growth.

Finally, the number of follow-up emails from respondents interested in the results indicates a high level of interest in some organizations for comparing and understanding the landscape of IP strategy and management in SE. Given the prevalence of intellectual property in non-profits, this knowledge could be useful to the entire non-profit sector by providing another set of strategies that manage IP assets to help governance teams achieve mission. Indeed, more robust IP asset data and opportunities for educating professionals in the nonprofit sector on the

utilization and strategic management of IP assets would be beneficial to the entire sector. More time, resources, and different methodologies could very quickly add to the baseline data collected from this small sample. This thesis and underlying survey is, hopefully, a starting place for future research into the role of governance teams in identifying, safeguarding, and managing IP assets as part of their fiduciary duties.

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Appendix A

Thank you for participating in this survey of intellectual property in the nonprofit sector. The survey should take approximately 15 minutes to complete and all responses will remain confidential. Please limit your responses to reflect only the organization at which you currently work.

Please indicate which of the following forms of intellectual property the organization has as part of its assets, brand, services, marketing and/or program materials. Please check all that apply.

- Trademark
- Copyright
- Trade secret
- Patent
- Other (please describe in box below)
- None of the above

In the previous question you indicated that the organization has trademark, copyright, or both. Please indicate which, if any, are officially registered.

- Copyright is registered with the U.S. Copyright Office
- Trademark is registered with the U.S. Patent & Trademark Office
- Both are registered
- Neither are registered
- I don't know

Does the organization have a written policy (or policies) regarding the intellectual property?

- Yes
- No
- I don't know

What does that policy (or policies) cover? Please check all that apply.

- Licensing of intellectual property
- Sale or transfer of intellectual property
- Safeguarding intellectual property through non-disclosure agreements when partnering with other organizations

- Registration of intellectual property with relevant governmental agencies (e.g., U.S. Patent Office)
- Using intellectual property as a strategic tool
- Enforcement of intellectual property rights through legal means (e.g., . patent enforcement or copyright infringement)
- Non-compete clause in employment agreements
- Proper use and display of brand and trademark
- Other (please describe in the box below)

Who suggested the need for intellectual property policies?

- Board of Directors, or similar
- Management
- Outside legal counsel
- Other (please describe in box below)

Who has the day-to-day responsibility for intellectual property within the organization?

- CEO/Executive Director
- COO
- CIO
- Chairman of the Board, or similar
- Other (please describe in box below)

Is this responsibility outlined in a policy?

- Yes
- No

Has your organization ever enforced its intellectual property rights through legal action?

- Yes
- No

I don't know

Was any of the organization's intellectual property created with funds from a foundation or government agency?

Yes

No

I don't know

Does the funder retain any rights to the intellectual property their funds developed?

Yes

No

Depends on the funder

I don't know

Does the organization hold the rights to the intellectual property developed with a funders money?

Yes

No

Depends on the funder

I don't know

Does an employee of the organization hold the rights to any of the intellectual property in use by the organization?

Yes

No

I don't know

Is there a policy regarding the vesting of rights for intellectual property developed while a person is employed by the organization?

Yes

No

I don't know

Who is authorized to make decisions regarding the use of intellectual property on behalf of the organization?

- CEO/Executive Director
- COO
- CIO
- Chairman of the Board, or similar
- Other (please indicate in box below)

Is this decision-making authority outlined in a policy?

- Yes
- No

Does the organization license any of its intellectual property to other users?

- Yes
- No

Does the organization charge a fee for the license to the intellectual property?

- Yes
- No
- Sometimes

Who do you license your intellectual property to? (Please check all that apply.)

- For profit organizations
- Non profit organizations
- Government agencies

Are licensees permitted to modify the intellectual property for their own purposes?

- Yes
- No

Do licensees need to seek permission before making modifications to the intellectual property?

- Yes

No

Are licensees authorized to sell the intellectual property to others?

Yes

No

Are licensees authorized to give the intellectual property to others as long as they do not charge for it?

Yes

No

Is the organization's intellectual property used to earn income?

Yes

No

I don't know

How is intellectual property used to earn income? Please check all that apply.

Program fees

Sales

Contracts to provide goods or services

Is the organization's intellectual property leveraged to create partnership opportunities with other organizations or agencies?

Yes

No

I don't know

What is the primary purpose of the partnerships leveraged through intellectual property? Please check all that apply.

Reach new constituents

Advocate

Generate revenue

Other (please describe in text box below)

Does the organization leverage the intellectual property to grow or scale the organization?

- Yes
- No
- I don't know

Does the organization have specific growth/scaling goals?

- Yes
- No

Does the organization leverage the intellectual property to recruit employees or board members?

- Just employees
- Just board members
- Both employees and board members
- Neither employees or board members
- I don't know

Has leveraging the intellectual property resulted in a larger candidate pool in the organization's efforts to recruit either staff or board members?

- Yes
- No
- I don't know

Does the organization leverage the intellectual property to seek grants or contracts from government agencies?

- Yes
- No
- I don't know

Does the organization have any current grants or contracts from government agencies that incorporate the use of any of the organization's intellectual property to achieve the goals/deliverables of the agreement?

- Yes
- No

Does the organization leverage the intellectual property to seek grants or PRI (program-related investment) support from foundations?

- Yes
- No
- I don't know

Does the organization have any current grants or PRIs from foundations that incorporate the use of any of the organization's intellectual property to achieve the goals/deliverables of the agreement?

- Yes
- No

What is your position at the organization?

- CEO/Executive Director
- COO
- CIO
- Chairman of the Board, or similar
- Other (please indicate in box below)

May we contact you with further questions?

- Yes
- No

Please provide your first and last name.

Please provide a daytime phone number.

Please provide your email address.

Thank you for taking the time to respond to this research survey.

If you have questions regarding the survey, please contact Michelle Walker at walkermi@iupui.edu.